

No. 89-850

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

**ROBERT G. CRONSON, AUDITOR GENERAL
OF THE STATE OF ILLINOIS,**

Petitioner,

vs.

**CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL
MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z.
HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE,
ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION OF THE SUPREME
COURT OF ILLINOIS; and STATE BOARD OF LAW
EXAMINERS OF THE SUPREME COURT OF ILLINOIS,**

Respondents.

**BRIEF OF STATE BOARD OF LAW EXAMINERS
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT**

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STATE BOARD OF LAW EXAMINERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner has demonstrated an interest protected under the due process clause of the Fourteenth Amendment?

2. If petitioner does have a protectable interest, whether his right to due process was denied because of alleged bias and prejudgment of the Illinois Supreme Court?

3. Whether the Rule of Necessity required the Illinois Supreme Court to deny petitioner's motion for recusal and substitution and to decide petitioner's case, despite petitioner's allegations of bias and prejudgment?

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Now comes respondent State Board of Law
Examiners of the Supreme Court of Illinois

(the "Board"), by and through its counsel, William J. Harte, and submits this brief in opposition to the Petition For Writ of Certiorari of Robert G. Cronson, Auditor General of the State of Illinois ("petitioner"):

ADOPTION OF CO-RESPONDENT'S
BRIEF IN OPPOSITION

The Board adopts the brief in opposition filed by respondent, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (the "Commission"), insofar as it is applicable to the Board, with the following additional remarks.

SUMMARY OF ARGUMENT

1. Petitioner has not demonstrated any liberty or property interest protected under

the due process provision of the Fourteenth Amendment.

2. Petitioner has not demonstrated any judicial bias, but in any event, no such bias which rises to a constitutional level.

3. The Rule of Necessity prevented the recusals of the four justices of the Illinois Supreme Court which petitioner sought below.

ARGUMENT

I.

PETITIONER DOES NOT HAVE A PROTECTABLE INTEREST.

Petitioner contends that he was denied a fair hearing on his Petition for Leave to Appeal before the Illinois Supreme Court and that his right to due process under the Fourteenth Amendment was thereby violated. As a prerequisite to claiming a violation of

his due process right, however, petitioner must demonstrate some liberty or property interest within the scope of due process protection. As the Court stated in Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972):

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

In Leis v. Flynt, 439 U.S. 438, 441 (1979), the Court further explained that:

...the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests that stem from an independent source such as state law.

In this case, petitioner has failed to show

how his desire to audit the Board and the Commission rises to the level of an interest protected under the Fourteenth Amendment.

II.

PETITIONER HAS NOT PROVEN
DISQUALIFYING BIAS.

Petitioner claims that unfairness resulted because his motion for the recusal of four Illinois Supreme Court Justices was denied and the Justices who were the subject of that motion participated in the decision denying his Petition for Leave to Appeal. Petitioner argues that due process required recusal of the four justices because of their bias and prejudgment of the issues involved in the controversy. Assuming that petitioner could demonstrate a protectable interest, his claim still fails because the bias he alleges does not rise to the level

of a constitutional violation.

This Court has repeatedly found that not all instances of alleged judicial bias present a constitutional issue. Recently, in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986), the Court stated:

The Court has recognized that not "[a]ll questions of judicial disqualification... involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." Tumey v. Ohio, 273 U.S. 510, 523 (1927);...

In Lavoie, the Court also cited FTC v. Cement Institute, 333 U.S. 683 (1948), to reiterate its position that "most matters relating to judicial disqualification [do] not rise to a constitutional level." Lavoie, supra, 475 U.S. at 820. Against this background the Court has narrowly defined the

level of bias which constitutes a Fourteenth Amendment violation. In Tumey v. Ohio, 273 U.S. 510, 523 (1927), this Court stated that the type of bias which gives rise to a due process violation is "a direct, personal, substantial, pecuniary interest." Clearly, petitioner has failed to meet this standard.

Petitioner, however, contends that this Court has recognized due process violations in other situations involving questions of judicial bias. For instance, petitioner claims the situation in Ward v. Village of Monroeville, 409 U.S. 57 (1972), "does not differ significantly" from this case. He states that in Ward, "control of institutional funds by a governmental entity was held by this Court to be a disqualifying factor." (Pet. for Writ. of Cert., p. 18).

In fact, there is no similarity between the facts of Ward and the facts of this case. In Ward the Court found that a mayor with "executive responsibilities for village finances" was not an impartial judicial officer. The Court explained that the fines imposed by the "mayor's court" were a major part of village income. In Ward the Court identified the mayor's responsibility for generating village income from fines imposed by him in the "mayor's court" as the source of disqualifying bias. This decision did not establish a different standard; it is only a variation of the previously articulated "direct, personal, substantial and pecuniary" standard which applies in this case and which petitioner is unable to satisfy.

Petitioner also cites In Re Murchison,

349 U.S. 133, 136 (1955), as another instance where, although there was no direct pecuniary interest involved, the Court held that a disqualifying bias was present. Petitioner cites Murchison for the principle that "no man can be a judge in his own case." He argues that in this case this principle was violated because the Board and Commission are alter egos of the Illinois Supreme Court and that that court, in effect, sat in judgment in its own case. In Murchison, however, the principle was applied to a judge who sought to decide a case he had initiated. In Murchison, a judge who presided over a "one man judge-grand jury" brought contempt charges against two of the witnesses who appeared before him in the grand jury proceeding. The judge then sought to try the contempt charges

against the two. This Court stated that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." Murchison, supra, 349 U.S. at 137. In Murchison, the intimate involvement in both the initiation and adjudication of a case illustrates the literal interpretation given by the Court to the maxim that "no man can be a judge in his own case." Unlike the judge in Murchison, the Illinois Supreme Court has been involved in this case in only a peripheral way. This case proceeded through the judicial system, where it was heard at the trial level and affirmed on appeal. The Illinois Supreme Court's connection with this case has been through the routine discharge of its administrative and supervisory responsibilities.

As a corollary to his general allegations of bias, petitioner claims that Justices Ward, Clark, Ryan and Moran should have been disqualified because they had prejudged the issues. In FTC v. Cement Institute, 333 U.S. 683 (1948), this Court considered whether prejudgment constitutes a type of disqualifying bias. In Cement Institute, although members of the Federal Trade Commission ("FTC") had apparently prejudged key issues involved in a case before the FTC, the Court found the FTC should not be disqualified from hearing the case. In reaching its decision, the Court stated:

Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.

Cement Institute, supra, 333 U.S. at 702-703. Further, the Court recognized that if the FTC were disqualified the matter in question would not have been acted upon by any governmental agency. In this case, as in Cement Institute, the alleged prejudgment petitioner complains of is not a basis for the disqualification of Justices Clark, Ward, Moran and Ryan and does not evidence a violation of petitioner's due process rights.

III.

THE RULE OF NECESSITY PREVENTS THE
RECUSALS REQUESTED BY PETITIONER.

Even if petitioner had formulated a viable constitutional argument, the Rule of Necessity prevented the recusals sought by him. This Court has recognized that the Rule of Necessity precludes judicial disqualification where disqualification would

deny litigants a forum in which to pursue their claims. See United States v. Will, 449 U.S. 20 (1980).

In accordance with Will, and in recognition of the overriding importance of making a forum available to litigants, the Illinois Supreme Court properly found that the Rule of Necessity applied in this case. Citing several provisions of the Illinois Constitution, the Illinois Supreme Court found that the recusals and substitutions sought by petitioner were constitutionally prohibited. (See Order of Illinois Supreme Court, filed July 27, 1989, attached as Appendix A to petitioner's petition.) Under these circumstances the court found that the Rule of Necessity required it to decide petitioner's Petition for Leave to Appeal rather than to deprive his case of consider-

ation because of the alleged bias of four of its members.

In Will, the Court considered the Rule of Necessity in relation to a disqualification otherwise required by federal law. The Court has also referred to the principle in the context of disqualification required by due process. In Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986), the Court reviewed a constitutional claim based on the failure of the justices of the Alabama Supreme Court to recuse themselves because of alleged bias. The Court noted:

...[A]ccepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a 'rule of necessity' none of the judges or justices would be disqualified. See United States v. Will, 449 U.S. 200 (1980).

As in Lavoie, petitioner's allegations of bias prove too much. Petitioner contends the Supreme Court has "litigated its own case in lower courts through its own controlled agencies and employees" and that for eight years he has found himself "in the almost surreal position of waging a bout with the ultimate referee." (Pet. for Writ of Cert., p. 16). Petitioner, however, does not explain how the recusal and substitution of four justices could change this. As long as a relationship exists between the Supreme Court, the Board and the Commission, any proceedings before the Supreme Court will remain subject to the same allegations of unfairness and bias. Regardless of the make-up of the court, petitioner could still argue that the court was sitting in judgment of its own case and, under petitioner's

reasoning, any judge sitting (however temporarily) in the court would be subject to disqualification. In this situation, the Rule of Necessity precludes any disqualifications based on petitioner's allegations of bias.

CONCLUSION

For the reasons stated herein, and those stated in the brief in opposition filed by the Attorney Registration And Disciplinary Commission Of The Supreme Court of Illinois, the State Board of Law Examiners of the Supreme Court of Illinois requests that this court deny the petition for writ

of certiorari of Robert G. Cronson, Auditor
General of the State of Illinois.

Respectfully submitted,

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